

0020

Internal
C/015/0025
Ø
#3213

From: Daron Haddock
To: April Abate; Jim Smith; Joe Helfrich; Karl Houskeeper; OGMCOAL
Date: 4/2/2009 4:56 PM
Subject: Fwd: Request for Agency Action Filed April 1, 2009 and Notice of Hearing dated April 2, 2009.
Place: OGMCOAL
Attachments: 2009-006 RqstForAgencyAction.pdf; 2009-006 NoticeofHearing.pdf

FYI--

>>> Marianne Burbidge 4/2/2009 3:52 PM >>>
See the attached Request for Agency Action filed April 1, 2009 and Notice of Hearing dated April 2, 2009.

If you have any concerns please let me know.

Thank you,

Marianne Burbidge
Division of Oil, Gas and Mining
Legal Secretary
(801) 538-5302
marianneburbidge@utah.gov

FILED

APR 01 2009

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

SECRETARY, BOARD OF
OIL, GAS & MINING

IN THE MATTER OF THE REQUEST FOR :
AGENCY ACTION OF HIAWATHA COAL : Docket No. 2009-006
COMPANY, INC., PETITIONER, FOR :
REVIEW OF THE CESSATION ORDER OF :
THE DIVISION OF GAS, OIL AND MINING :
OF FEBRUARY 5, 2009 FOR THE : Cause No. C/015/0025A
BEAR CANYON MINE :

COMES NOW Hiawatha Coal Company, Inc., a Utah corporation ("Hiawatha" or "Petitioner") and pursuant to §40-10-22(3)(a) Utah Code requests a hearing for review of the action of the Division of Oil, Gas and Mining (the "Division") in upholding and refusing to modify that certain Cessation Order for the Bear Canyon Mine dated February 5, 2009 (the "Cessation Order") and for temporary relief from the Cessation Order as allowed by §40-10-22(c) Utah Code pending the Board's consideration of this request and in support hereof alleges as follows. The Cessation Order and the Division's Findings of Fact, Conclusions of Law and order are attached as Exhibits A and B, respectively.

JURISDICTION

1. Hiawatha has an interest that will be adversely affected by the Cessation Order and has, therefore, standing to bring this action under §40-10-22(3)(a).

PERTINENT FACTUAL BACKGROUND

2. Prior to June 24, 2008 the Bear Canyon Mine was operated by C. W. Mining, a permittee of the Division, of which Hiawatha is the successor in interest as contemplated by §40-10-9(2), Utah Code arising from its acquisition of the assets of C. W. Mining on June 24, 2008.

3. Within 30 days of succeeding to the interests of C. W. Mining on June 24, 2008 and as required by §40-10-9(2), Utah Code, Hiawatha filed its application for a new reclamation permit, and has continuously mined the Bear Canyon Mine until the present, *i.e.*, almost 9 months, under the authority of §40-10-9(2), which states as follows:

A successor in interest to a permittee who applies for a new permit within 30 days after succeeding to the interest and who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan of the original permittee until the successor's application is granted or denied.

4. The reclamation bond of C. W. Mining has remained in place during the entire period from June 24, 2008 to the present time, although Hiawatha has attempted to obtain its own reclamation bond coverage.

5. Hiawatha's attempts to secure its own bond coverage have been complicated by the fact that C. W. Mining's creditors forced C. W. Mining into an involuntary Chapter 11 proceeding in the U. S. Bankruptcy Court for the District of Utah styled *In re C. W. Mining Company dba Co-Op Mining Company* and numbered 08-10105 (the "Chapter 11 Proceeding").

6. In the Chapter 11 Proceeding the court issued what has been called its "Preservation Order," which has been construed by C. W. Mining's creditors to inhibit any action by Hiawatha to secure its reclamation bond and by the Division to issue a permit to Hiawatha.

7. As a result of the court's Preservation Order, Lyndon, from which Hiawatha seeks to get its bond, has been unwilling to complete the bonding process, presumably out of fear of violating the Preservation Order.

8. The Division has also been somewhat reluctant to finalize the permit process because of the Preservation Order, although Hiawatha does not believe the Preservation Order can enjoin the Division from the exercise of its regulatory/police powers, and the most

recent indication from the Division is that it will issue the permit once the bond is secured.

9. Hiawatha has taken legal action in the Chapter 11 Proceeding to get the court to allow Hiawatha to complete its bond application, but that request has been denied.¹ In the meantime, Hiawatha's hands are tied concerning the bond because of the Preservation Order and the Division has opted to issue the Cessation Order rather than allow Hiawatha to continue to mine pending the resolution of the peripheral issues surrounding the Preservation Order.

LEGAL AUTHORITY AND ARGUMENT

10. As the following discussion will show, Hiawatha believes that the Division Cessation Order was illegal and contrary to the Division's own rules and regulations and requests that the Board, both temporarily and permanently, determine that the Cessation Order was improvidently issued and either rescind it or modify it to allow Hiawatha to continue to mine.

11. The transfer, assignment, or sale of permit rights from C. W. Mining to Hiawatha is governed by R645-303-300, which is restated hereafter for the Board's convenience and with certain parts emphasized by underlining and certain pertinent comments added where appropriate:

R645-303-300. TRANSFER, ASSIGNMENT, OR SALE OF PERMIT RIGHTS.

R645-303-320. **Application Requirements.** An applicant for approval of the transfer, assignment, or sale of permit rights will:

- 321. Provide the Division with an application for approval of the proposed transfer, assignment, or sale including:
 - 321.100. The name and address of the existing permittee and permit number or other identifier;
 - 321.200. A brief description of the proposed action requiring approval; and

¹Because the Division action and any action taken by this Board are within its police powers to regulate, Hiawatha believes that the Division and this Board are not bound by any order of the Bankruptcy Court, as discussed in more detail below.

- 321.300. The legal, financial, compliance, and related information required by R645-301-100 for the applicant for approval of the transfer, assignment, or sale of permit rights;
322. Advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved, indicating the name and address of the applicant, the permittee, the permit number or other identifier, the geographic location of the permit, and the address to which written comments may be sent; and
323. Obtain appropriate performance bond coverage in an amount sufficient to cover the proposed operations, as required under R645-301-800.

COMMENT: From the clear language of 321 above, the application itself is separate from the advertising requirements (322) and obtaining a performance bond (323). The fact they are separately dealt with and separately identified in the rule clearly means that the performance bond requirement is entirely separate from the application itself.

If there is any remaining doubt as to whether the bond requirement is separate from the permit application, it should be entirely dispelled by the following language in Rule R645-301-320.100 relating to the permit application:

R645-301-820.100 “After a permit application under R645-301 has been approved, but before a permit is issued, the applicant will file with the Division, on a form prescribed and furnished by the Division, a bond or bonds for performance made payable to the Division and conditioned upon the faithful performance of all the requirements of the State Program, the permit and the reclamation plan.”

COMMENT: The import of this language is that Hiawatha is not required to file a reclamation bond until the permit application has been approved. Therefore, a bond is clearly not part of the permit application process itself, *i.e.*, the permit application is not incomplete because of lack of a bond.

It also means that the bonding requirement is separate from the permit application process.

Moving to the actual Cessation Order, both Code Ann. §40-10-22(1)(b) and Division Rule R645-400-311 allow the Division to issue a cessation order only if a permit violation or other condition or practice “[c]reates an imminent danger to the health or safety of the public [. . .] or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.” There is, however, an exception to the authority to issue a cessation order, which Hiawatha believes applies to it. R645-400-312 states:

Coal mining and reclamation operations conducted by any person without a valid coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, unless such operations are an integral, uninterrupted extension of previously permitted operations, and the person conducting such

operations has filed a timely and complete application for a permit to conduct such operations. [emphasis added]

There can be no doubt that Hiawatha is engaged and since June 24, 2008 has been engaged in mining operations that are an integral, uninterrupted extension of previously permitted operations, *i.e.*, those of C. W. Mining. It is common knowledge that C. W. Mining's operations at the Bear Canyon Mine were "previously permitted" under the rule and that the mining operations of Hiawatha since that time constitute an "integral, uninterrupted extension" of the C. W. Mining operations. It is also without question that Hiawatha has filed a timely and complete application for a permit to conduct such operations.

The cessation order itself cites the following as justification of the issuance of a cessation order, which the Division characterizes as "mandatory:"

"R645-301-812.700, adequate bond coverage required at all times; R645-303-323 prior to approval of a transfer of a permit the operator shall obtain an adequate surety; and R645-303-310, no assignment or transfer of a permit will be made without the prior approval of the Division."

Each of the three (3) alleged violations is discussed separately as follows:

R645-301-812.700. This requirement is filled by the existing bond by C. W. Mining. There is nothing in this rule which requires Hiawatha to provide additional bond coverage beyond the already existing "adequate bond coverage" while it is still in the application process. If this provision in fact has the meaning that the Division ascribes to it, the other provisions cited above would have no meaning. It must be read in conjunction with R645-301-820.100 and the exception in R645-400-312 to give a reasonable meaning to the process.

R645-303-323. While this requirement is acknowledged, it also must be read in conjunction with R645-301-820.100, which recognizes that it is the Division's approval of the application that triggers Hiawatha's obligation to provide an adequate surety. Because the approval process is ongoing, it is incongruent for the Division to cite Hiawatha's not having filed a bond when that obligation does not even arise until after the application is approved by the Division.

R645-303-310. While it is acknowledged that the Division has the authority to grant or deny Hiawatha's application, Hiawatha believes that the authority should be considered in the context of Hiawatha's pending application to the Division. Hiawatha respectfully submits that upon a determination by DOGM that Hiawatha's permit transfer application satisfies the requirements of R645-303-321, DOGM's approval of the application is a non-discretionary exercise of DOGM's police/regulatory power. Once that occurs, Hiawatha must then file a bond as a prerequisite to DOGM's transfer of the permit itself. Hiawatha further submits that its application is complete and that the time is right for DOGM to make that determination and approve the application. Because DOGM's approval of the application is a necessary pre-condition, it will be of inestimable value to Hiawatha in its efforts to secure a bond.

Hiawatha believes that this Board may take the action requested by Hiawatha because the Court lacks jurisdiction to make rulings which might interfere in the regulatory

process of the Division of Gas, Oil and Mining or the Board in the exercise of its police powers. For example, in *Bickford v. Lodestar Energy, Inc.*, 310 B.R. 70 (E.D.Ky. 2004), a coal mining case with facts very similar to the facts in this case, the district court reversed the bankruptcy court conclusion that the enforcement of certain reclamation bonding requirements by the state agency charged with that obligation was a violation of the automatic stay. The district court concluded at 78-79 that the bonding requirement "serves the purpose of protecting the citizens of the Commonwealth against the dangers posed by land that is not reclaimed and proceedings to enforce the bonding requirements are not subject to the automatic stay." [emphasis added] The point here, of course, is that the State's regulatory powers to enforce the bonding requirement are an exception to the automatic stay at 11 USC §362(b)(4) and not within the court's power to enjoin. See also *In re Yellow Cab Co-Op. Ass'n*, 132 F.3d 591, 599 ¶ 34 (10th Cir. 1997) (State administrative agency's action to reduce the scope of an operating certificate "was governmental action" exempted from the automatic stay by §362(b)(4)); and *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988) ("Congress clearly intended for the police power exception to allow governmental agencies to remain unfettered by the bankruptcy code in the exercise of their regulatory powers.")

CONCLUSION

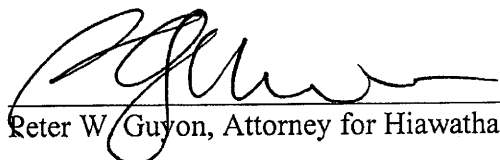
The process contemplated by the rules cited above is composed of five (5) steps: (1) The application is filed; (2) if the application is incomplete or otherwise deficient, the Division notifies the applicant, who then provides the additional information to make the application complete; (3) upon finding the application is complete, the Division approves the application; (4) the applicant obtains a bond as required by the Division; and (5) the Division then transfers the permit. Presently, it appears Hiawatha has completed step 2. Once the Division approves the application (step 3), only then will Hiawatha have to comply with the bond requirements, after which the Division issues the permit. In the meantime, however, Hiawatha is under no obligation to provide a bond, as its application is still in process, and will be so until it is approved by the Division. That approval, and only that approval, will trigger the requirement to provide the bond.

At present, Hiawatha is operating under the existing C. W. Mining Company permit and bond, which DOGM rules allow a permit transfer applicant to do. Hiawatha's operations are an integral, uninterrupted extension of previously permitted operations, and Hiawatha has filed a timely and complete application for a permit to conduct such operations, all authorized under R645-400-312. Under the circumstances, the cessation order was improvidently issued and should be vacated.

RELIEF SOUGHT

Hiawatha seeks an order from the Board either vacating the Cessation Order and/or amending the Cessation Order to allow Hiawatha to continue to mine the Bear Canyon Mine.

Respectfully submitted this 31st day of March, 2009.


Peter W. Guyon, Attorney for Hiawatha

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed, first-class postage prepaid, a true and correct copy of the foregoing IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF HIAWATHA COAL COMPANY, INC., PETITIONER, FOR REVIEW OF THE CESSATION ORDER OF THE DIVISION OF GAS, OIL AND MINING OF FEBRUARY 5, 2009 FOR THE BEAR CANYON MINE to the following on this 31st day of March, 2009:


Hiawatha Coal Company, Inc.
ATTN: Elliot Finley, Pres.
Post Office Box 1240
Huntington, UT 84528

Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

Secretary
Board of Oil, Gas and Mining
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 1210
P.O. Box 145801
Salt Lake City, Utah 84114-5801

Steve Alder, Esq.
Assistant Utah Attorney General
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 300
Salt Lake City, Utah 84114

DATED this 31st day of March, 2009.



Peter W. Guyon, Attorney for Hiawatha

c:\wp12\clientfiles\hiawatha_aquila\DOGM_administrative_matters\3.hiawatha_request_for_agency_action



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

February 5, 2009

CERTIFIED RETURN RECEIPT REQUESTED
7005 2570 0000 4801 7710

Elliot Finley, Resident Agent
Hiawatha Coal Company
P.O. Box 1240
Huntington, Utah 84528

Subject: Cessation Order for the Bear Canyon Mine

Dear Mr. Finley:

Based on inspections and communications, the Division has determined that since November 20, 2008, or earlier you have been in violation of: R645-301-812.700, adequate bond coverage required at all times; R645-303-323 prior to approval of a transfer of a permit the operator shall obtain an adequate surety; and R645-303-310, no assignment or transfer of a permit will be made without the prior approval of the Division. The consequence of these violations is that Hiawatha has been conducting mining operations without a permit and pursuant to R645-400-310 and 312 a cessation order is mandatory and penalties are to be assessed under R645-401-400 for each day of the violation.

Accordingly, Hiawatha Coal Company, Inc. is hereby ordered to cease mining activities as follows:

1. Hiawatha is to immediately and hereafter cease any and all mining operations that will result in an increase in the amount of current surface disturbance area in any manner or degree.
2. No mining operations shall proceed or continue that are intended to or are or part of the work required to develop any additional long-wall panel beyond the long-wall panel currently in production.
3. Hiawatha will contact the BLM to request any necessary modifications to the BLM approved mine plan (requirements and approval of that plan will be separately handled by BLM). Hiawatha will contact MSHA and the Utah Office of Mine Safety regarding cessation of mining.

1594 West North Temple, Suite 1210, PO Box 145801, Salt Lake City, UT 84114-5801
telephone (801) 538-5340 • facsimile (801) 359-3940 • TTY (801) 538-7458 • www.ogm.utah.gov



EXHIBIT "A"

Page 2

Hiawatha Coal Company

C0070011

February 5, 2009

Hiawatha will accommodate inspection(s) as arranged by BLM and DOGM to review current mining operations and plans. Hiawatha will present to DOGM and BLM an operational plan with anticipated dates for pulling the long-wall from the current long-wall face (whether at the end of the panel or to reposition due to sandstone channels).

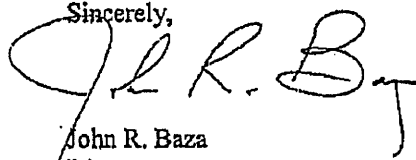
4. At the conclusion of mining in the current long-wall panel as set forth in item 3, no further coal mining will be permitted until the violations resulting in the Cessation Order have been fully resolved.

To abate and lift this Cessation Order Hiawatha Coal Company, Inc. must :

1. Post a bond of \$1,731,000 in a form acceptable to the Division.
2. Provide a complete and accurate response to the deficiencies identified in a letter to Elliot Finley from the Division, dated January 28, 2009 (attached).
3. Obtain the Division's conditional approval of the transfer of the permit; i.e., subject to any further orders by the bankruptcy court granting approval of transfer of the permit from C.W. Mining Co. to Hiawatha Coal Company on an interim or permanent basis (recognizing it may take some time). This conditional approval of the transfer of the permit will terminate in the event the court eventually determines that C.W. Mining was/is not allowed to transfer the permit, and in such event Hiawatha will be required to immediately advise the Division and commence actions to transfer the permit to an approved operator or close the mine.

If you have any questions regarding this Cessation Order, please contact myself (801) 538-5334, or Dana Dean (801) 538-5320.

Sincerely,



John R. Baza
Director

DD/vs

P:\GROUPS\COAL\WP\007011.HIA\FINAL\252009CO-dd.doc



Citation for Non-Compliance Utah Coal Regulatory Program

1594 West North Temple, Salt Lake City, UT 84114
Phone: (801) 538-5340 Fax: (801) 359-3940

Citation #: 10034

Permit Number: C0150025

Date Issued:

☐ NOTICE OF VIOLATION ☒ CESSATION ORDER (CO) ☐ FAILURE TO ABATE CO

Permittee Name: Hiawatha Coal Company, Inc.

Inspector Number and ID: 50 DDEAN

Mine Name: Bear Canyon Mine

Date and Time of Inspection: 01/26/2009 10:30 am

Certified Return Receipt Number:

Date and Time of Service: 02/05/2009 4:00 pm

Nature of condition, practice, or violation:

Since November 20, 2008, or earlier you have been in violation of: R645-301-812.700, adequate bond coverage required at all times; R645-303-323 prior to approval of a transfer of a permit the operator shall obtain an adequate surety; and R645-303-310, no assignment or transfer of a permit will be made without the prior approval of the Division. The consequence of these violations is that Hiawatha has been conducting mining operations without a permit.

Provisions of Act, regulations, or permit violated:

R645-301-812.700
R645-303-323
R645-303-310

☒ This order requires Cessation of ALL mining activities. (Check box if appropriate.)

☐ Condition, practice, or violation is creating an imminent danger to health or safety of the public.

☒ Permittee is/has been conducting mining activities without a Permit.

☐ Condition, practice, or violation is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

☐ Permittee has failed to abate Violation(s) included in
☐ Notice of Violation or ☐ Cessation Order within time for abatement originally fixed or subsequently extended.

☐ This order requires Cessation of PORTION(S) of mining activities.

Mining activities to be ceased immediately: ☒ Yes ☐ No

Abatement Times (if applicable).

See attached letter for cessation requirements.

Action(s) required: ☒ Yes ☐ No

See attached letter for abatement requirements.

Elliot Finley

(Print) Permittee Representative

DANA DEAN

(Print) DOGM Representative

Permittee Representative's Signature - Date

DOGM Representative's Signature - Date

SEE REVERSE SIDE OF This Form For Instructions And Additional Information

Original - DOGM Files Copy - Permittee

Form DOGM NOV/CO Revised - August, 2006

IMPORTANT - READ CAREFULLY

Pursuant to the Utah Coal Mined Land Reclamation Act, Utah Code Ann. § 40-10-1 et. seq. (Act), the undersigned authorized representative of the Division of Oil, Gas, and Mining (DOGM) has conducted an inspection and found that a Notice of Violation or Cessation Order must be issued.

This order shall remain in effect until it is modified, terminated or vacated by written notice of an authorized representative of DOGM.

1. PENALTIES.

Proposed assessment. DOGM assesses fines based upon a proposed recommendation by an assessment officer. If there is additional information you wish DOGM to consider regarding the cessation order and proposed fine, please submit that to DOGM within *15 days of the date this notice or order is served on you or your agent*. Such information will be used by the assessment officer in determining facts surrounding the violation(s) and amount of penalty. Once DOGM has determined the proper penalty, it will serve the proposed assessment on you or your agent, no later than 30 days of the issuance of this notice or order. See Utah Admin. Code R645-401-600 et. seq.

The penalty will be final unless you or your agent file, within 15 days of receipt of the proposed assessment, a written request for an informal hearing before the assessment officer.

Assessment. For each violation included in this notice, a penalty of up to \$5,000 may be assessed for each separate day the violation continues.

If you fail to abate any violation within the time set for abatement or for meeting any interim step, you will be assessed an additional minimum penalty of \$750 for each day of continuing violation beyond the time set for abatement. You will be issued a Cessation Order requiring cessation of surface coal mining operations or the portion of the operations relevant to the violation.

2. INFORMAL PUBLIC HEARING.

On the reverse side of this page, an authorized representative has made a finding as to whether or not this notice requires cessation of mining. If this order or notice requires cessation of mining, expressly or in practical effect, you may request that an informal public hearing be held at or near the mine site. If you wish an informal public hearing be held, please contact an authorized representative from DOGM. See Utah Admin. Code R645-400-350 et seq. Once an informal public hearing is scheduled, you will be notified of the date, time, and location of the hearing.

If this notice requires cessation of mining, it will expire within 30 days from the date you are notified unless an informal public hearing is held or waived, or the condition, practice, or violation is abated within the 30-day period.

3. FORMAL REVIEW AND TEMPORARY RELIEF.

You may appeal this notice or order to the Board of Oil, Gas, and Mining by submitting an application for hearing within 30 days of receipt of this notice or order. See Utah Admin. Code R645-300-164,300. Please submit the application for hearing to:

Secretary
Board of Oil, Gas, and Mining
1594 West North Temple, Suite 1210
PO Box 145801
Salt Lake City, Utah 84114-5801

If applying for a formal board hearing, you may submit with your petition for review a request for "*temporary relief*" from this notice. Procedures for obtaining a formal board hearing are contained in the Board's Rules of Practice and Procedure and in Utah Admin. Code R645-401-800 et. seq.

4. EFFECT ON PERMIT.

The permit may be suspended or revoked if it is determined that a pattern of violations of the Act, regulations or permit conditions exists, and that the violations were caused by an unwarranted or willful failure to comply.

For further information, consult Utah Code Ann. § 40-10-20 through 40-10-23 and Utah Admin. Code R645-400-300 et. seq. and R645-401 et. seq., or contact the Division of Oil, Gas, and Mining at (801) 538-5340.

**BEFORE THE DIVISION OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

---00000---

IN THE MATTER OF THE
INFORMAL HEARING AND
INFORMAL ASSESSMENT
CONFERENCE FOR NOTICE OF
VIOLATION; VIOLATION No.
N10034, HIAWATHA COAL
COMPANY, BEAR CANYON
MINE, C/015/0025, EMERY
COUNTY, UTAH

FINDINGS of FACT,
CONCLUSIONS OF LAW
AND ORDER

CAUSE NO. C/015/0025

---00000---

BACKGROUND.

On February 18, 2009, the Division of Oil, Gas and Mining (Division) held an Informal Hearing and Assessment Conference as provided for by R645-400-350 and R645-401-700 Utah Administrative Code (2008). The hearing was held in response to the written request by Hiawatha Coal Company (Hiawatha) for an informal hearing pursuant to R645-400-350 to review the fact of violation for Cessation Order 10034 (CO) issued to it on February 5, 2009 for operations at the Bear Canyon Mine, C/015/0025, Emery County, Utah. Hiawatha and the Division stipulated that this informal hearing fulfilled the opportunity for an informal review of the fact of the violation as permitted and provided for under both by R645-400-350 and R645-401-700, Utah Administrative Code (2008) and that the right of Hiawatha to seek immediate review of the Cessation Order before the Board is not restricted or infringed.

ISSUES

The Division in its Cessation Order # 10034 found that Hiawatha was operating in violation of rules R645-301-812.700, adequate bond coverage required at all times; R645-303-323 adequate surety required prior to approval of a permit transfer; and R645-303-310 no transfer or assignment will be made without the prior approval of the Division. In consequence of these violations the Division found that Hiawatha was conducting mining operations without a permit in violation of R645-400-312 requiring issuance of the Cessation Order.

Hiawatha in its written request for an Informal Assessment Conference requested that the Cessation Order be withdrawn. Hiawatha asserts that it is not required to file a bond until the Division finds the application for transfer to be complete, and that in any event it has done all that it can do to transfer the surety to its name, that such continued mining operations are covered by the existing bond and that continued mining pending approval of the transfer of the permit is not a violation under R645-400-312 and R645-303-300 to 360.

EXHIBIT "B"

No penalty had been assessed as of the time of the hearing and the hearing was held in advance of such assessment to review the fact of the violation. Hiawatha will be afforded an opportunity to seek review of the amount of the penalty as a continuation of this informal assessment conference when the amount of penalty has been determined and the Division has given Hiawatha notice of the amount assessed.

PARTIES

John Baza, Director of the Division of Oil, Gas, and Mining, served as the hearing officer. The Board of Oil, Gas and Mining has designated the Director of the Division as its representative for the purpose of conducting informal hearings under R645-400-355. The Director was also selected to serve as the assessment conference officer to review the fact of the violation pursuant to R645-400-721.

Peter Guyon, attorney at law, represented Hiawatha at the hearing. Elliott Finley, Charles Reynolds, and Mark Reynolds attended as representatives for Hiawatha. Mark Hansen, attorney at law, attended and participated in the hearing on behalf of Joseph Kingston and Rachel Young, persons owning water rights that they allege are affected by the order. Troy Aramburu, of Jones, Waldo, Holbrook and McDonough, appeared for Lyndon Properties Insurance Co. Dana Dean, Associate Director, and Daron Haddock, Permit Supervisor, appeared for the Division to present the facts and history of the Cessation Order. The Division was represented by Steve Alder, Assistant Attorney General.

No recording or transcript of the conference was made.

PROCEDURAL HISTORY

1. The Cessation Order #10034 was served on Elliot Finley on February 5, 2009.
2. A Request for an informal hearing pursuant to Rule R645-400-350 was delivered to the Division on February 9, 2009.
3. In response to the request, the Division sent Notice to Hiawatha by certified mail on February 10, 2009 that in accordance with R645-401-700 an informal assessment conference was to be held February 18, 2009 to review the fact of the violation and the proposed penalty.
4. On February 18, 2009 the above named parties appeared. After the Mr. Hansen raised concerns about the inconsistency between the type of hearing requested and the nature of the notice, the parties determined to proceed with the informal conference to review the fact of the violation and to hear Hiawatha's objections to the CO and the Division's response.
5. Hiawatha's counsel presented a letter with the legal arguments in support of its position that the CO was inappropriate and the Division presented its

response. After the legal arguments were presented and arguments exchanged, the Hearing officer presented questions to each of the parties to determine more of the facts concerning the legal and financial qualifications of Hiawatha to transfer the permit and the options for obtaining or transferring the surety.

Based on the arguments and evidence presented, the Hearing Officer makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 8, 2008 C.W. Mining, the permit holder and operator of the Bear Canyon mine, became the subject of a petition of involuntary bankruptcy commenced by creditors.
2. On June 24, 2008 Hiawatha entered into a written agreement for the sale of the Bear Canyon Mine and transfer of the permit.
3. Prior to the agreement to transfer the permit, C. W. Mining was fully permitted and bonded as the operator of the Bear Canyon Mine with Lyndon Insurance Co. as the surety.
4. The agreement of sale between C.W. Mining and Hiawatha required the bonding be kept in place pending final approval of the transfer.
5. After the agreement of sale Hiawatha took over the operations of the mine and applied for a transfer of the permit on August 4, 2008. Notice of the proposed transfer was published as required by the rules on July 1, 2008.
6. On August 8, 2008 the bankruptcy court issued an order precluding C.W. Mining from taking any further actions to complete the transfer and advising the Division that the parties were not to seek any regulatory approvals of the transfer until the matter of the objections filed by the creditors was addressed further by the court.
7. On September 26, 2008 the bankruptcy court denied the objections of C.W. Mining to the petition for involuntary bankruptcy, confirming the bankrupt status and continuing jurisdiction of the court.
8. On November 20, 2008 Hiawatha was advised by the Division in writing that they needed to supply missing information required for permit transfer and a surety for the mining operations no later than December 1, 2008.
9. On December 24, 2008 Hiawatha was advised that all of the information that was required had been submitted except for a reclamation surety that needed to be provided by January 8, 2009 to avoid a cessation order.

10. On January 7, 2009 the Division met with representatives of Hiawatha and to allow additional time to provide a surety and agreed to advise Lyndon of the urgent need for a surety for Hiawatha to avoid a CO.
11. On January 8, 2009 Hiawatha and Lyndon were advised by letter that all information needed had been provided except the bond and that a surety must be provided by January 26, 2009 to avoid the issuance of a cessation order.
12. On January 23, 2009 the Division was advised by counsel for Lyndon that Lyndon had agreed to provide a surety upon certain terms which included Hiawatha providing collateral of \$600,000.00, personal guarantees of Elliot Finley, and Melody Finely, a guarantee from Standard Industries, and monthly payments of \$100,000.00.
13. As of February 5, 2009 Hiawatha had not submitted a signed application for the surety with Lyndon under their agreement as required, had not posted the collateral required, and had not provided the guarantees; Hiawatha had also not taken any other action with other parties to provide a surety as required.
14. On February 5, 2009 Cessation Order #10034 was issued requiring that Hiawatha: (1) cease all operations that may result in an increase in the amount of surface disturbance; (2) cease any work that was intended or was part of the development of any long wall panel in addition to the current panel; (3) communicate with the BLM, MSHA, and the Utah Office of Mine Safety regarding anticipated termination of mining operations; and (4) after the completion of the mining in the current long-wall panel cease all coal mining operations.
15. In order to abate Cessation Order #10034 Hiawatha was required to (1) provide a surety in the amount of \$1,731,000, (2) provide a complete response to the additional deficiencies as identified in letter dated January 28, 2009, and (3) obtain the Division's approval of the transfer that may be subject to further orders of the bankruptcy court regarding the right of C.W. Mining to transfer the permit. (A response to the letter of January 28, 2009 had been submitted as of the day of the hearing.)
16. At the informal hearing Hiawatha confirmed that as of that day it had still not submitted a signed application, made payment of collateral, or taken any of the other actions required for a bond with Lyndon in accordance with their offer, and had not taken any other action with other parties to provide a surety as required.

CONCLUSIONS OF LAW

1. Notice of the informal hearing was given as required for both an informal hearing and an informal assessment as required by the appropriate rules and the hearing was conducted at a time and place as agreed by the parties and consistent with the requirements of the Coal Mining and Reclamation Act (Act).
2. The informal conference fulfilled the requirement for an informal hearing before the Division of the cessation order including the facts of the violation and the hearing officer was properly authorized to conduct the hearing.
3. No party, including Hiawatha, is precluded by the holding of the hearings or the failure of the Division to determine a penalty and provide an opportunity for an assessment conference on the penalty form pursuing an appeal of the cessation order directly to the Board of Oil, Gas and Mining as provided for at Utah Code §40-10-22(3) and pursuant to any other provisions of the Act, or the rules.
4. C. W. Mining's permit may be transferred to Hiawatha provided that "[N]o transfer, assignment, or sale of the rights granted under any permit . . . shall be made without the written approval of the Division, §40-10-12(2) Utah Code (2009); and R645-303-310 Utah Administrative Code (2009).
5. The transfer of C.W. Mining's permit must be made and approved by the Division in accordance with R645-303-300 to 360 Utah Administrative Code (2009) which requires submitting an application with all required information, advertising the filing of the application, and obtaining appropriate performance bond coverage; and only when these requirements are satisfied can the Division make findings, give notice of the findings, and the permit transfer be consummated. R645-303-300 to 360, Utah Administrative Code (2009)
6. Hiawatha's coal mining operation of the Bear Canyon mine without a permit requires the issuance of a cessation order *unless* the mining operations are part of an integral uninterrupted extension of previously permitted operations, *and the person has filed a timely and complete application for a permit to conduct such operations*. R645-400-312, Utah Administrative Code (2009).
7. Hiawatha has been allowed a reasonable opportunity since its purchase on June 24, 2008 to submit a complete application and to obtain a bond, and Hiawatha has failed to take reasonable and appropriate actions to timely file a complete application including its complete failure to take necessary actions to acquire a bond.
8. Hiawatha has been given numerous notices of the immediate and urgent need to provide a bond in order to operate under the permit as a transferee including written notice on December 24, 2008 and January 8, 2009 when Hiawatha was told that the information required for the application was all

provided except for the bond and that a bond was needed or a cessation order would be given.

9. Since Hiawatha has not submitted a performance bond or other guarantee, or obtained the bond coverage of the original permittee as requested and as required by R645-301-800 and R645-303-323, the Division cannot approve the transfer of the permit.
10. The Division cannot continue to allow Hiawatha to operate without a permit in violation of R645-400-312 since it has failed without good cause to comply with the application requirements for transfer of the permit.
11. The Cessation Order is crafted in a manner that will enforce the requirement of the Act that operators be fully bonded and have a valid permit before conducting coal mining operations and will also provide for the safety of the miners, avoid loss of coal, and allow for a safe termination of operations.

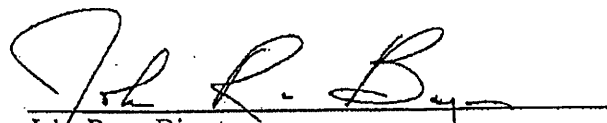
ORDER

NOW THEREFORE based on the foregoing findings of fact and conclusions of law, the Cessation Order is found to be appropriate and is upheld and Hiawatha is to comply with all of the terms and conditions as set forth therein.

RIGHT TO APPEAL

Hiawatha, as the Operator, and any party adversely affected by Cessation Order # 10034 which was the subject of this hearing, are advised that they have the right pursuant to Utah Code §40-10-22(3) and R645-400-360, Utah Administrative Code to appeal the cessation order by filing a request for agency action in accordance with the Rules of the Board within 30 days of the notice of this decision.

SO DETERMINED AND ORDERED this 2nd day of March 2009


John Baza, Director
Division of Oil, Gas and Mining

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IN THE MATTER OF
THE INFORMAL HEARING AND INFORMAL ASSESSMENT CONFERENCE FOR
NOTICE OF VIOLATION; VIOLATION No. N10034, HIAWATHA COAL COMPANY,
BEAR CANYON MINE, C/015/0025, EMERY COUNTY, UTAH,
To be sent by email and to be mailed with postage prepaid, this 2nd day of March, 2009 to the
following:

Peter W. Guyon
Attorney at Law
Counsel for Hiawatha Coal Company
10 Exchange Place, #614
Salt Lake City, UT 84111
Pguyon@yahoo.com

F. Mark Hansen,
Attorney at Law
Counsel for Joseph Kingston and Rachael Young
431 North 1300 West
Salt Lake City, UT 84116
fmhlaw@comcast.net

Lon Jenkins
Counsel for Lyndon Insurance
Jones Waldo Holbrook and McDonough
1170 South Main Street #1500
Salt Lake City, UT 84101
ljenkins@joneswaldo.com

Michael N. Zundel, et al
Prince Yeates & Geldzahler
Counsel for Chapter 7 Trustee, Kenneth A. Rushton
175 East 400 South
Salt Lake City, UT 84111
mnz@princeyeates.com

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

---oo0oo---

IN THE MATTER OF THE REQUEST
FOR AGENCY ACTION OF HIAWATHA
COAL COMPANY, INC., PETITIONER,
FOR REVIEW OF THE CESSATION
ORDER OF THE DIVISION OF OIL, GAS,
AND MINING OF FEBRUARY 5, 2009
FOR THE BEAR CANYON MINE

NOTICE OF HEARING

Docket No. 2009-006
Cause No. C/015/0025A

---oo0oo---

THE STATE OF UTAH TO ALL PERSONS INTERESTED IN THE FOLLOWING
MATTER.

Notice is hereby given that the Board of Oil, Gas and Mining ("Board"), State of Utah, will conduct a hearing on WEDNESDAY, APRIL 22, 2009, at 10:00 A.M., or as soon thereafter as possible, in the North America Conference Room 1S 1101 at the Rio Tinto Regional Center, 4700 Daybreak Parkway, South Jordan, Utah.

The hearing will be conducted as a formal administrative adjudication in accordance with the rules of the Board as set forth in Utah Administrative Code R641-100 through 641-119 *et seq.* as provided for by Utah Code Ann. § 40-10-1 *et seq.* and Utah Code Ann. § 63G-4-101 through 601 *et seq.*

The purpose of the hearing will be for the Board to receive testimony and evidence regarding a Request for Agency Action that the Board enter an Order:

1. Vacating the Cessation Order and/or amending the Cessation Order to allow Hiawatha to continue to mine the Bear Canyon Mine; and
2. Providing such other relief as may be just and equitable under the circumstances including consideration of the request for temporary relief from the cessation order as permitted under Utah Code section 40-10-22(3)(c).

Objections to the Request for Agency Action must be filed with the Secretary of the Board at the address listed below no later than the 10th day of the month, or two weeks before the scheduled hearing, whichever is earlier. A party must file a timely written objection or other response in order to participate as a party at the Board hearing.

Natural persons may appear and represent themselves before the Board. All other representation by parties before the Board will be by attorneys licensed to practice law in the

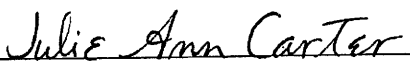
State of Utah, or attorneys licensed to practice law in another jurisdiction which meet the rules of the Utah State Bar for practicing law before the Utah Courts.

Persons interested in this matter may participate pursuant to the procedural rules of the Board. The Request for Agency Action, and any subsequent pleadings, may be inspected at the office of the undersigned.

Pursuant to the Americans with Disabilities Act, persons requiring auxiliary communicative aids and services to enable them to participate in this hearing should call Julie Ann Carter at (801) 538-5277, at least three working days prior to the hearing date.

DATED this 2nd day of April, 2009.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING
Douglas E. Johnson, Chairman



/s/ Julie Ann Carter
Secretary to the Board
1594 West North Temple, Suite 1210
Salt Lake City, Utah 84116
(801) 538-5277

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing NOTICE OF HEARING for Docket No. 2009-006, Cause No. C/015/0025A to be mailed with postage prepaid, this 2nd Day of April, to the following:

Peter W. Guyon, P.C.
Attorneys for Petitioner
Suite 614, 10 Exchange Place
Salt Lake City, UT 84111

Michael S. Johnson
Stephen Schwendiman
Assistant Attorneys General
Utah Board of Oil, Gas & Mining
1594 West North Temple, Suite 300
Salt Lake City, UT 84116
(Via Email)

Steven F. Alder
Kevin Bolander
Assistant Attorneys General
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 300
Salt Lake City, UT 84116
(Via Email)

Hiawatha Coal Company, Inc.
Attn: Elliot Finley, Pres.
Post Office Box 1240
Huntington, UT 84528

F. Mark Hansen
Counsel for Joseph Kingston
and Rachael Young
431 North 1300 West
Salt Lake City, Utah 84116

Lon Jenkins
Counsel for Lyndon Insurance
Jones Waldo Holbrook and McDonough
1170 South Main Street #1500
Salt Lake City, Utah 84101

Michael N. Zundel, et al.
Prince Yeates & Geldzahler
Counsel for Chapter 7 Trustee,
Kenneth A. Rushton
175 East 400 South
Salt Lake City, Utah 84111

Pamela Brown, Forest Supervisor
Forest Service
Manti-La Sal National Forest
599 West Price River Road
Price, Utah 84501

Kent Hoffman, Deputy State Director
Bureau of Land Management
State Office
440 West 200 South, Suite 500
Salt Lake City, Utah 84101

Julie Ann Carter

CERTIFICATE OF PUBLISHED NOTICE

I hereby certify that I caused a true and correct copy of the foregoing NOTICE OF HEARING for Docket No. 2009-006, Cause No. C/015/0025A to be PUBLISHED in the following newspapers on the following days:

March 7, 2009:

The Salt Lake Tribune and Deseret Morning News, newspapers of general circulation in Salt Lake City and County.

March 7, 2009:

Emery County Progress, a newspaper of general circulation in Emery County.

March 7, 2009:

Sun Advocate, a newspaper of general circulation in Carbon County.

Julie Ann Carter